In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-912

DAVID T. DELLINGER, RENNARD C. DAVIS, THOMAS E. HAYDEN, ABBOTT H. HOFFMAN AND JERRY C. RUBIN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On March 20, 1969, petitioners were indicted, *inter alia*, on various counts involving violations of the Federal Anti-Riot Act of 1968, 18 U.S.C. 2101. Each was found guilty and sentenced to imprisonment for a period of five years and fined $5,000. On November 21, 1972, the Court of Appeals for the Seventh Circuit reversed the judgments of conviction because of errors committed during the course of the trial. The court, however, sustained the constitutionality of 18 U.S.C. 2101 and of the indictment returned under it in this case, and found that the evidence against each peti-

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tioner had been sufficient to support the verdict. The court therefore remanded the case for a new trial if the United States elected to reprosecute the case.

The petition for a writ of certiorari was filed by the defendants on December 21, 1972. The sole question presented is whether 18 U.S.C. 2101 "violates on its face and as construed the Constitution of the United States and in particular the First, Fifth, Ninth, Tenth, and Thirteen [*sic*] Amendments thereto?" (Pet. 3).

We bring to the attention of the Court the following facts which show that the petition for a writ of certiorari should be denied.

On January 15, 1973, the United States elected not to retry petitioners and moved to dismiss the indictment with prejudice. The motion to dismiss was unopposed, and on January 18, 1973, an order was entered in the United States District Court for the Northern District of Illinois dismissing the indictment with prejudice.

"The indictment having been dismissed, the question [presented by the petition] * * * is not involved in such a real sense as to give this court jurisdiction." *Lewis* v. *United States,* 216 U.S. 611, 613. One is not entitled to a determination of the constitutionality of a statute *in vacuo,* but only insofar as the constitutionality of the statute affects his claim that its application to him would be invalid. Because the indictment has been dismissed with prejudice, petitioners can no longer be prosecuted for the actions which resulted in their earlier convictions. There is, therefore, no occasion for the Court to consider reviewing the judgment of the court of appeals which permitted a

retrial.[1] Cf. *Benton* v. *Maryland*, 395 U.S. 784, 788–790; *Taylor* v. *McElroy*, 360 U.S. 709, 711; *Golden* v. *Zwickler*, 394 U.S. 103, 108–110; *Public Service Commission of Utah* v. *Wycoff Company, Inc.*, 344 U.S. 237; *Gray* v. *Board of Trustees*, 342 U.S. 517; *Committee to Free the Fort Dix 38* v. *Collins*, 429 F. 2d 807, 811–812 (C.A. 3).

For the foregoing reasons, and those expressed in the majority opinion sustaining the constitutionality of the Federal Anti-Riot Act of 1968, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1973.

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[1] Similar considerations underlie the well settled rule that a defendant cannot appeal from a dismissal of an indictment, for he is not aggrieved by the termination of the proceedings in his favor. *Parr* v. *United States*, 351 U.S. 513, 516–517.

U.S. GOVERNMENT PRINTING OFFICE: 1973